BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES

INTRODUCTION

The New Jersey Board of Public Utilities ("Board" or "NJBPU") submits the following comments in response to the Report and Order and Further Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("Commission") on March 5, 2007, under MB Docket No. 05-311, concerning implementation of Section 621(a)(1) of the Communications Act of 1934, as amended (the "Communications Act" or the "Act"). Section 621(a)(1) of the Act, codified as 47 U.S.C. § 541(a)(1), provides that a franchising authority "may not unreasonably refuse to award an additional competitive franchise." The Commission's release serves both as an Order implementing a new regulatory regime as well as a notice of proposed future rulemaking. Because the Commission "tentatively conclude[s] that the findings in this Order should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs," the Board is required to discuss the underlying Order and the reasoning and rational used. (NPRM, at ¶ 140)

The Board understands, of course, that the Order is a final decision and that comments on the decision to modify the regulatory regime as to new entrants has passed. The Board does not, however, take a position on the assertion that the Commission has the legal authority to preempt local franchising authority, other than to note that because this Order does not apply to the Board and New Jersey, a legal argument is unnecessary.

As set forth in a number of places in the NPRM, the Commission has made clear that the decision to preempt existing franchise authority and regulation does not apply "with respect to franchising decisions where a state is involved, either by issuing franchises at the state level or enacting laws governing specific aspects of the franchise process." (NPRM, at ¶ 1, n. 2) Thus, the Order "only addresses decisions made by county- or municipal-level franchising authorities." (Ibid.) Based upon this language, the Order does not apply to New Jersey, either in terms of its traditional or systemwide franchising. The Board calls upon the Commission to ensure that this exemption from preemption continues in any future rulemaking as well.

In New Jersey, the Board of Public Utilities, and through it the Office of Cable Television, is the local franchising authority ("LFA"). Two types of franchising exist in the State: traditional and systemwide. Traditional franchising in New Jersey is a bifurcated process, with the local municipality having initial control over the use of the public rights-of-way and negotiating the municipal consent under which a cable television operator receives a non-exclusive franchise for the political subdivision. N.J.S.A. 48:5A-22. Once the municipality has exercised its authority, the Board, as the federally recognized local franchising authority, 47 U.S.C. § 522(10); 47 U.S.C. § 543, reviews the actions of the municipality and ensures compliance with State and federal cable requirements. N.J.S.A. 48:5A-17. The Board, in this oversight role, ensures that the demands of both parties, the municipality and the cable operator, are reasonable and within the scope of the relationship. Further, the Board, under N.J.S.A. 48:5A-17, has the ability to issue a franchise even if a municipality has denied a municipal consent based upon a finding that the denial was arbitrary and capricious. The cable television companies in the State are well aware of this process, and have used it to ensure that the demands of the municipalities are rationally related to the needs and costs associated with cable television service in that particular municipality. In this way, the Board makes certain that unreasonable or excessive demands on the part of a municipality are not used as a bar to the issuance of a franchise. The Board expects that this approach can and will be used to ensure the reasonableness of competitive traditional franchises now and in the future.

As to systemwide franchising, the State, in response to the desire to streamline and encourage competitive franchising, passed P.L. 2006, c.83. This legislation allows an entity with existing authority to use the public rights-of-way in a municipality to seek approval from the Board to provide cable television service without the need for additional municipal consent. This systemwide franchise process runs parallel to the existing traditional franchising discussed above, and may be used by both incumbent and competitive cable providers. Systemwide franchising sets a timeframe to act on a competitive franchise of 45 days from receipt of an application for a system-wide franchise.

In the only application for a systemwide franchise to date, the Board issued a competitive franchise to Verizon New Jersey, Inc. for 316 municipalities within 43 days of its application. This is well short of any timeframe considered "reasonable" for the grant of a competitive franchise by the Commission. It is further noted that Verizon is, as of April 1, 2007, offering cable television service in all or parts of 168 municipalities in the State. It is also important to note that any provider currently governed by the traditional franchise scheme may instantly convert to a systemwide franchise in New Jersey.

Based upon the Commission's prior and continued recognition that states such as New Jersey should not be preempted in franchising issues, the Board, because it is the local franchising authority, asserts that preemption should not apply to existing franchise agreements up for renewal any more than it applies to competitive franchises in the State. With this in mind, the Board calls upon the Commission to explicitly exclude states such as New Jersey from any additional preemption activity associated with the NPRM.

CUSTOMER SERVICE

Likewise, the Board agrees that preemption of customer service and consumer protection standards that exceed the Commission's standards would be inappropriate and contrary to law. Based upon the experience of New Jersey, customer service and consumer protection standards are and remain best considered and enforced by the entity that has the best level of knowledge of local franchising issues – in the case of New Jersey, the Board. The Board reaffirms its belief that local franchising authorities are best suited to address the public concerns and adopt adequate regulations to best ensure consumer protection and development of competition in the video marketplace.

Blanket preemption by the Commission on customer service provisions, particularly where the provisions are governed by state law, is not the answer. Broad based and designed to address issues that affect most consumers on a national basis, federal regulations should be a minimum and not a maximum framework. Such standards cannot address the many situations faced by local regulators (i.e., the Board) in an ever changing market. They can complement, but should not replace, local New Jersey consumer protection. Consumers should not have to wait for federal rules to catch up every time a new need arises. Where there is federal preemption, customers are often restricted in their ability to seek redress for grievances until the situation they face becomes more commonplace and a federal policy or rule is established to address it.

Local authorities like the NJBPU are in the best position to balance the needs of incumbent providers, new market entrants seeking to expand competition, and the customers they serve. Having experienced first hand the level of general consumer discontent over a lack of choice of video providers, the Board and the State have a vested interest in expanding competition in the video market, and have done so.

We believe that in a true, fully competitive environment, with multiple wireline providers engage in head-to-head competition, many elements of traditional monopoly regulation can be displaced by the market, but we are not there yet. In a nascent competitive market like New Jersey, where large scale wireline competition is only beginning to emerge, consumers continue to be vulnerable to market manipulations that can adversely affect service availability and quality. The tendency of many providers to lock customers in by requiring bundled service packages, 12-24 month agreements in order to get their best price, and large termination fees if the contract is broken, customers' ability to "vote with their feet" and switch providers if they are unsatisfied with the provider's service is significantly limited.

When facing such daunting choices of service and technology, consumers have come to expect and deserve the type of individual attention they can only receive at the State level when seeking information and addressing grievances. Consumers should be able, like in New Jersey, to have a single place to take complaints and receive individual attention. Because of New Jersey's vested local interest in addressing consumer requests for choice, New Jersey is better able to respond to changing conditions. States have frequently been first to provide consumer relief when issues like slamming or cramming emerged, with the flexibility to develop direct and appropriate remedies. In New Jersey, all regulations include a sunset provision which provides a regular opportunity to examine changing market conditions and consider needed changes to the regulatory scheme. Where market conditions change more rapidly, the Board has the ability on its own motion to institute a rulemaking proceeding to address them. Where even swifter action is warranted, New Jersey's rules provide for waivers of general rule provisions for good cause, which may be sought by any affected party at any time. As such, local (i.e., NJBPU) regulation is beneficial to all parties.

Congress clearly recognized the pivotal role that local regulators play with its passage of the 1992 Cable Act. Congress was aware that its early efforts to deregulate cable had not delivered on the promised competition and control on rates. Rather, it led to greater concentration and vertical integration. 47 U.S.C. § 521; Congressional Findings and Policy: Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, §§ 2(a), (b), 28, Oct. 5, 1992, 106 Stat. 1460. Congress found in the 1992 Cable Act that most subscribers did not have the opportunity to select between competing cable systems, resulting in an undue market power of the cable operator. Ibid. Congress also found that customer service standards were of significant importance. To address this situation, the 1992 Cable Act not only required the Commission to issue rules governing customer service, to be enforced by local authorities, it specifically allowed local regulators to enact more stringent consumer protection standards if they found them to be necessary. 47 U.S.C. § 552(d)(2). In doing so, Congress clearly envisioned that the Commission and local regulators would act as partners in fostering competition while protecting the interests of consumers.

For these reasons, the Board urges the Commission to recognize the important role that local regulators such as the NJBPU play, embraces us as partners in the process, and conclude as Congress intended in the 1992 Cable Act that the Commission cannot preempt state or local customer service laws that exceed Commission standards, nor can the Commission prevent LFAs and cable operators from agreeing to more stringent standards.

FRANCHISING ISSUES

While satisfied with the Commission's statements about the desire to not preempt the State's authority on franchising issues, the Board is concerned that the Commission may seek to preempt state franchising regulations in the future. The

Board's franchising laws represent a proper balance in a developing competitive environment and the Commission should not seek to usurp a process for competitive franchising that works, as evidence over time will make clear.

The Board recommends that no action be taken by the Commission on any systemwide or statewide franchise, regardless of the requirements contained in the franchise. New Jersey, as the local franchising authority, has and will continue to be reasonable. Additionally, as noted in Commissioner Adelstein's statement, Verizon is required to build out certain municipalities in New Jersey, but this is in no way an "unreasonable refusal" because Verizon agreed to requirement, the franchise was issued, and the build-out requirement was a reasonable and rational request. Furthermore, as Commissioner Adelstein noted, Section 621(a)(4)(A) provides that "[i]n awarding a franchise the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." Commissioner Adelstein goes on to note that without any express statutory authority, the Commission has no power to find that requirements asserted by LFAs for build-out to all households in a franchise area over a reasonable period of time are "unreasonable." The Board agrees; the Commission should not interfere with state authority for build outs, especially where there are provisions which allow a cable television company to seek relief. In New Jersey, a systemwide franchisee is permitted to seek relief from its build out requirements where it would be commercially impracticable or where it cannot access public rights-of-way under reasonable terms and conditions. Thus, the build-outs in New Jersey are reasonable.

The Board notes that the municipal consent process is still in effect under the State Cable Act, if a cable television company wishes to use it. However, P.L. 2006, c.83 also provides that an incumbent cable television company may convert its cable television franchises, either all at once or one at a time, to a systemwide franchise, simply by notifying the Board and the municipality or municipalities affected. While, in its initial comments on this matter, the Board supported a streamlining by the Commission of the renewal process, the Board notes this issue is now moot, at least in New Jersey. Since an incumbent cable television company can choose to either renew its traditional cable television franchises or convert them to a system-wide franchise at any time, there is no longer a need to expressly streamline the traditional renewal process in the State. Therefore, the Board recommends that if the Commission determines it must apply the rules to renewals, it should extend its proscription of interfering with state laws regarding franchising to franchise renewals.

However, the Board would like to note that the tentative conclusion reached by the Commission – that renewals should fall under the requirements of the Order in general – is unnecessary and unwarranted. There is no harm that befalls a cable television company whose renewal negotiations become extended in New Jersey. The cable television company is permitted and required to continue to provide cable television service to residents of a municipality pending the outcome of negotiations. N.J.S.A. 48:5A-17f and 25. If an interim order is issued by the Commission on a renewal, the cable television company would have no incentive to resolve the issues in discussion. In fact, the issuance of an interim order would most likely further forestall negotiations, possibly for an even longer period of time than would occur under normal renewal negotiations. The sum outcome could be that the Commission would vote to remove even more authority from the local franchising authorities because of even more protracted negotiations. The Board disagrees entirely with the notion of issuance of federal interim orders in franchise renewal matters.

As to the other matters the Commission would put under the umbrella of "unreasonable refusal" in renewal cases, such as public, educational and governmental ("PEG") access support, payments, and franchise fees, the Board notes that Section 611(a) provides "[a] franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use," and Section 622(a) provides "any cable operator may be required under the terms of any franchise to pay a franchise fee," but that these provisions do not distinguish between incumbents and new entrants. The New Jersey Legislature has found that the requirements for a systemwide franchise are different and because the systemwide franchisee is afforded the benefit of reduced regulation, certain provisions which could not be imposed by a municipality in the State should be included in the systemwide franchise. For example, a systemwide franchisee is required to pay four percent of gross revenues for a franchise fee, while traditional cable television companies are only required to pay a two percent franchise fee, until such time as the systemwide franchisee is certified to be able to provide service to a majority of the municipality. As noted above, it is a cable television operator's choice whether to negotiate the terms of the franchise with the individual municipality or to comply with the requirements of statute in seeking or converting the municipality to a systemwide franchise, and as such, a cable television company might have vastly different agreements from one municipality to another.

Insofar as the Commission discusses the “most favored nation” clauses included in some traditional cable television franchises, there is no concern regarding these in New Jersey. The Board, as the local franchising authority in the State, has required this type of clause to be contingent upon approval by the Board. In addition, the language is specific to the grant by the individual municipality, that if it issues a franchise on a more favorable basis, then the incumbent cable television company may also assume those provisions. Since the Board issues a systemwide franchise, these clauses are not applicable. Once again, the Board requests that the Commission refrain from negating state franchising laws that work, such as those in New Jersey.

FRANCHISE FEES

In its NPRM accompanying its Order regarding franchising of new competitors, the Commission issued a tentative conclusion that the provisions of its Order should be extended to apply to incumbent cable operators as they negotiate renewal of those agreements with LFAs. For purposes of consistency and clarity, pursuant to the Commission’s findings that this Order does not apply to state LFAs, the provisions of the Order should equally not be applied to incumbent cable operators in New Jersey during the franchise renewal period.

The Board notes that the application of certain provisions of the Order to both competitive and incumbent operators in New Jersey would create inequities in the newly adopted regulatory structure currently in effect with no accompanying public policy benefit. Specifically, with respect to the Commission’s findings regarding the proper calculation of franchise fees and the 5 percent cap as it relates to PEG funding, we do not see the need for new or further broadly pre-emptive rulemaking actions by the Commission. The Board notes that the mechanisms for addressing franchise fee abuse have long been available to incumbent operators, and remain available to new competitors as well. Where, as in New Jersey, franchise fees are set on a statewide basis, an allegedly aggrieved cable operator has had recourse to the Commission since the enactment of the 1984 Cable Television Act.

The Board concurs with the sentiments expressed by Commissioner Adelstein in his dissenting statement:

> Although the *Order* purports to provide clarification with respect to which franchise fees are permissible under the Act, it muddles the regime and leaves communities and new entrants with conflicting views about funding PEG and I-Net. Indeed, Congress provided explicit direction on what constitutes or does not constitute a franchise fee, with a remedy to the courts for aggrieved parties.
>
> Today's Order should make clear that, while any requests made by an LFA unrelated to the provision of cable service *and* unrelated to PEG or I-NET are subject to the statutory five percent franchise fee cap, these are not the type of costs excluded from the term "franchise fee" by section 622(g)(2)(C). That provision excludes from the term "franchise fee" any "capital costs that are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities." The legislative history of the 1984 Cable Act clearly indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.'"

Moreover, New Jersey law provides additional remedies at the state level for incumbent cable operators who experience difficulties with obtaining municipal consents from municipalities. Under New Jersey Statutes, <u>N.J.S.A.</u> 48:5A-17(d), incumbent cable operators may petition the Board to obtain a franchise if they can show a municipality arbitrarily refuses to grant municipal consent to the cable operator.

The anecdotal complaints of operators cited in the Order and NPRM are nothing new, and yet, if such abuses are widespread, cable operators have relatively rarely pursued their remedies at the Commission. Moreover, it appears that the anecdotally based concerns of the Commission may well be exaggerated, as they are based on "demanding" or "asking" without any perspective data on what was winnowed out through educating the LFAs on the legally permissible calculation of the franchise fees, as well as the final results of the negotiation. As noted above, due to the existence of sufficient safeguards at both the federal and state levels, the provisions of the Commission's order on the calculation of franchise fees are not necessary for New Jersey cable operators at this time.

BUILD OUT

New Jersey awarded Verizon its system wide franchise within 43 days of Verizon's filing an application. That franchise approval mandated Verizon to build out only the 60 most densely populated cities and all county seats in the State. Within those 60 towns of the 526 served by Verizon, the company agreed to match the line extension policy where it exists of the incumbent cable operator serving streets under a shared cost formula between Verizon and the subscriber.

New Jersey's reform legislation is not contrary to the Commission Order nor does it undermine federal interests. In the three months since the approval, Verizon has activated service in 160 municipalities of the 344 it has applied to serve, demonstrating that no provision in its New Jersey franchise has served as a barrier or impediment to entry. In addition, Verizon is free to add additional municipalities to its systemwide franchise application without seeking approval of the NJBPU.

This systemwide franchise requires Verizon to begin service within the first three years of its seven year franchise, and completion six years after it becomes capable of providing service. Further, an anti-redlining requirement exists in both the statute and the legislation's companion Executive Order 25. Verizon can petition the Board if it believes it cannot deploy service if a) it cannot access a development or building because of a claimed exclusive arrangement with another cable television company; b)it cannot access a development or building using its standard technical solutions, under commercially reasonable terms and conditions after good faith negotiation; or c)it cannot access the public rights-of-way under reasonable terms and conditions.

Therefore, what is generally seen as a significant obstacle to deployment of competitive services – "onerous" build out requirements – is not an issue in the provisions of service for a competitive operator in New Jersey. While the NJBPU must still protect against discriminatory practices, our franchise award did not force a build out in an unreasonable scope or timeframe. Therefore, the system wide franchise conditions under which Verizon was allowed entry do not impose any risks or burden which Verizon has not agreed to accept and at the same time it fits the model which the NJ Legislature determined was the most reasonable for our state – a state with a long history of "the most wired state in the nation" since the mid-1980's.

CONCLUSION

As noted above, New Jersey has been excluded from the Commission's Order and it should likewise be excluded from the NPRM and proposed regulations. New

Jersey has been at the forefront of progressive cable television regulation such that preemption by the federal government is neither necessary nor appropriate. Accordingly, the Board calls upon the Commission to ensure that states such as New Jersey continue to have the right and ability to regulate cable televisions in a manner fair and equitable to all parties – incumbents, new providers, and consumers. The freedom to continue to regulate as the State has done for the past 40-plus years will ensure that New Jersey can remain in the forefront of cable television access and benefits.

Respectfully submitted,

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